separate community is held much less firmly and generally than formerly, and changing political conceptions, deriving from domestic and international pressures, and operating coincidentally with improved transport and communication facilities, are contributing greatly to the weakening of the notion."

PRIVATE INTERNATIONAL LAW: EXTRA-TERRITORIAL EFFECT OF STATUTES; PROPER LAW OF A CONTRACT.

Boissevain v. Weil.[1]

While, owing to war conditions, the parties were involuntarily resident in Monaco, which was in military occupation of the enemy, the plaintiff, a Dutch subject, lent the defendant, a British subject, the sum of 960,000 francs, which it was agreed should be repaid at the exchange rate of 160 francs to the pound. The defendant drew cheques in blank for the full amount on an English bank, wrote a letter addressed to the bank informing it of the circumstances, and instructing it, on presentation or as soon as the law permitted, to honour the cheques in sterling. She signed a document undertaking to repay the sum borrowed in cash if the plaintiff failed to obtain payment on presentation of the cheques. The evidence showed that the defendant's bank account did not in fact exist.

The defendant repudiated the debt, and the plaintiff brought an action for money lent with interest. In the divisional court,[2] the defences were: (1) that the transaction was prohibited by the *Trading with the Enemy Act* 1939, (2) that the transaction was illegal by Monegasque law, and (3) that the transaction was prohibited under the *Defence (Finance) Regulations* 1939. Croom-Johnson J. rejected these defences and found for the plaintiff. On appeal, defendant relied only on the *Defence (Finance) Regulations* 1939 which provided: "Except with permission granted by or on behalf of the Treasury, no person other than an authorized dealer shall buy or borrow any foreign currency . . . from any person not being an authorized dealer." Section 3 (1) of the *Emergency Powers (Defence) Act* 1939 provided: "Unless the contrary intention appears therefrom, any provisions contained in, or having effect under, any Defence Regulation shall . . . (b) in so far as they impose prohibitions, restrictions or obligations on persons, apply to all persons in the United Kingdom . . . and to all other persons being British subjects"—with the exception of persons in certain specified territories.

The plaintiff replied that on its proper construction the regulation had no extra-territorial effect and that it should be construed as applying only to territories in which it is possible to obtain a consent of the Treasury, or in which it is reasonable to contemplate the existence of, or access to, an authorised dealer. Counsel argued also that even if it had extra-territorial effect, it should not be applied to transactions in enemy-

1. [1949] 1 All E.R. 146.
2. [1948] 1 All E.R. 893.

occupied territory between two persons both of whom, for the purposes of trading with the enemy, are to be regarded as enemies. Croom-Johnson J. accepted these contentions, but the Court of Appeal said that in its terms the regulation was wide enough to cover all foreign countries, and that the *Trading with the Enemy Act* 1939 contemplated Treasury authority being given to transactions which might without such authority be struck out by the legislation.

The plaintiff's principal argument against the wide application of the Regulations was the *argumentum ad absurdum* that to apply them literally would, for example, mean that a British subject permanently resident in America would be prohibited from borrowing a few dollars there. The answer to this was that the proper law of such a contract would be American law. Denning L.J. said[3] that whether such a contract " creates legal obligations or not, depends on the proper law of the contract, and that depends not so much on the place where it is made or on the intention of the parties as on the place with which it has the most substantial connexion." The validity of the contract in the case put, being governed by American law, in no way depends on what the English *Defence Regulations* may provide. He went on to say that it is not certain that such a contract could be enforced in England. " The validity of the contract is one thing, and the enforcement of it is another."[4] Considerations of public policy would be relevant, and an English Court, while recognizing the validity of the contract, would have to take account of the fact that " a British subject is not allowed to make a payment to any resident outside the sterling area without the consent of the Treasury."[4]

The plaintiff alternatively claimed that he ought to be able to recover on the principle of unjust enrichment—see the remarks of Lord Wright in *Fibrosa etc. v. Fairbairn* :[5] " The gist of the action is a debt or obligation implied or more accurately imposed by law, in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost." But to allow this claim to succeed would be to say that the law imposed an obligation which had, in the opinion of the Court, been expressly prohibited by legislation to which it was bound to give effect.

The Court of Appeal (Tucker, Asquith and Denning L.JJ.), in unanimously finding for the defendant on the above grounds, did not take time for consideration, and a great deal seems to be implied in the judgments of Tucker and Denning L.JJ. which warrants further discussion.

It seems that Tucker L.J. regarded English law as the proper law of the contract of loan. It was not necessary for him to make a definite finding on this question, for even if English law was not the proper law, it was relevant as the *lex fori*, and as part of the *lex fori*, the *Defence Regulations* operated as rules of the distinctive public policy of the *forum* so as to prevent an English court enforcing a contract affected by the Regulations irrespective of the proper law governing the contract. He saw further justification for the application of English rules of distinctive

3. [1949] 1 All E.R., at 153.
4. *Ibid.*, at 153.
5. [1943] A.C. 32, at 63.

public policy in the fact that the performance of the contract was to take place in England. This reference at p. 152 to the place of performance is merely for the purpose of adding a further reason why the *Defence Regulations* should be applied as being part of English public policy.

Tucker L.J. did not advert to the effect of these Regulations as part of the *lex loci solutionis* if English law was not the proper law—indeed it was not necessary for him to do so, for, in his opinion, if it did not apply as part of the proper law, then it clearly applied as part of the public policy of the *lex fori*. If the effect of English law as the *lex loci solutionis* only had been the issue, the case would have presented an opportunity to debate the vexed question of illegality by the *lex loci solutionis*.

Denning L.J. expressly limited the extra-territorial operation of the Regulations " to contracts of which the proper law is the law of England."[6] With this limitation, the effect of the Regulations should be recognized by the Courts everywhere. There can be no dispute as to the correctness of this approach, but if the result of this method of delimiting the effect of the Regulations is to bring about their application to contracts entered into by British subjects wherever they may be (unless in one of the excepted countries) so that the delimitation of their effect coincides with the sphere of their operation as defined by the United Kingdom Parliament, the words " proper law " must have a special meaning. Since the decision of the Privy Council in *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*,[7] it has been generally assumed, though not without doubt, that the test of the proper law of a contract is the intention of the parties, and that the parties are free to select any proper law " provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy."[8] Where no express selection of a proper law has been made, the presumed intention of the parties is to be objectively determined from an examination of all the circumstances of the contract. The result in the latter case is that the parties are deemed to have submitted themselves to the law with which the contract has the most real connexion.

However, Denning L.J. says that the proper law depends not so much on the place where it is made or on the intention of the parties as on the place with which it has the most substantial connexion.[9] The *Vita Food Case* was not referred to, but Denning L.J. summarily dismissed the difficulty which would have arisen had the parties in this case stipulated that some system of law other than English law was to be the proper law by saying that the proper law would still be English law, and that a British subject (covered by the Regulations) could not escape the effect of those regulations by express reference to another system of law. His observations on the effect of an arbitrary selection of the proper law to govern a contract are *obiter*, but his decision in the instant case is based on a rejection of the " intention " test and an acceptance of the " real connexion " test for the purpose of determining the proper law.

It may be that if the action had been brought in the courts of some other country which applied the " intention " test in the manner contem-

6. [1949] 1 All E.R., at 153.
7. [1939] A.C. 277.
8. *Ibid.*, at 290.
9. [1949] 1 All E.R., at 153.

plated by the Judicial Committee, and the parties had selected some system other than English law, such courts might have applied the *Defence Regulations* as part of the public policy of the indigenous proper law in the manner suggested by Dr. Cheshire.[10] " It should be regarded as contrary to the public policy of the *forum*, or at least as contrary to the comity of nations, deliberately to disregard the public policy of another civilized State which is substantially the *situs* of the contract."[11] This would still leave some field of operation for the proper law selected, for example, on questions of construction. On Denning L.J.'s reasoning, the expressed intention of the parties presumably would have no legal effect.

E. F. McCarthy
A. J. Ellwood

10. *Private International Law*, 3rd ed., p. 330.
11. *Ibid.*

PROCEDURE: SERVICE OUT OF THE JURISDICTION.

In *Tyne Improvement Commissioners v. Armement Anversois Societe Anonyme ; The Brabo*[1], is discussed the wreck of the *Brabo*, which obstructed shipping passing up the River Tyne to Newcastle. The task of removing it fell upon the Tyne Improvement Commissioners and involved them in an expenditure of close on £250,000. The *Tyne Improvement Act* 1890, section 42 gave them a general right to recover these expenses from the owners of the ship and her cargo. But in this instance the Commissioners encountered difficulties.

The cargo consisted of ordnance stores which, for all practical purposes of the action, were considered the property of the Ministry of Supply. The ship itself was owned by the respondent, a Belgian company, registered and resident in Belgium. The Commissioners sought leave to serve notice of the writ upon the respondent, who normally would be outside the jurisdiction of an English court. Reliance was placed upon O. XI. r. 1. (g), *R.S.C.*[2] allowing service when the person out of the jurisdiction is " a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction."

It was therefore necessary to shew that the action was " properly brought " against the Minister of Supply.

Both the Court of Appeal and the House of Lords held that the Minister in this case was acting as agent of the Crown. Was he therefore bound by the *Tyne Improvement Act* which did not expressly or by necessary implication purport to bind the Crown ? Obviously not—*vide Bombay v. Bombay.*[3]

It was argued that the Minister might waive his immunity. The Lords rejected this on the ground that " the Court ought not to assume

1. [1949] 1 All E.R. 294
2. Victorian *R.S.C.* have the same provision. As to High Court, see O. IX. (3) of *High Court Rules.*
3. [1947] A.C. 58.